

September 17, 1999

Patricia A. Kurkel  
Regional Administrator  
National Marine Fisheries Service  
Northeast Regional Office  
One Blackburn Drive  
Gloucester, MA 09130

Re: Fisheries of the Northeastern United States; Spiny Dogfish Management Plan

Dear Ms. Kurkel:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by §612 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. On March 28, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act which made a number of significant changes to the Regulatory Flexibility Act, the most significant being provisions to allow judicial review of agencies' regulatory flexibility analyses.

### **Spiny Dogfish Proposal**

On August 3, 1999, the National Marine Fisheries Services (NMFS) proposed a rule entitled Fisheries of the Northeastern United States; Spiny Dogfish Fishery Management Plan, Federal Register, Vol. 64, No. 148, p.42071. Although the NMFS performed an Initial Regulatory Flexibility Analysis (IRFA) of the rule, the Office of Advocacy is concerned by agency's limited consideration of possibly more creative alternatives and apparent acceptance that this proposal could destroy the fishing industry altogether.

### **Purpose and Impact of the Rule**

The purpose of the Spiny Dogfish Management Plan is to implement a remedial action to address the overfished status of the Spiny Dogfish. The proposal will implement:

- 1) a commercial quota;
- 2) a seasonal (semi-annual) allocation of a commercial quota;
- 3) a prohibition on finning;
- 4) a framework adjustment process;
- 5) the establishment of a Spiny Dogfish Monitoring Committee;
- 6) an annual FMP review;
- 7) permit and reporting requirements for commercial vessels, operators, and dealers; and

8) other measures regarding sea samplers, foreign fishing, and experimental fishing activities.

The intent of the plan is to rebuild the spawning stock and eliminate overfishing while still allowing for a 1-year exit fishery.

### **Impact of Proposal on the Spiny Dog Fishing Industry**

NMFS acknowledges that the proposal will have a significant economic impact on a substantial number of small entities. The IRFA indicates that in one year of the preferred rebuilding schedule, there will be a 30 % reduction in landings compared with the status quo. The reduction will cause a decrease in revenues of greater than 5% for approximately 149 vessels and for 2 processors. In year 2, there will be a 89% reduction in landings relative to the status quo, 232 harvesters will have a gross reduction in revenues of greater than 5%, based on the status quo, and 12 harvesters may cease operations. *Id.* at 42074. Since processing is highly dependent on volume, the reduction in landings could result in the elimination of the remaining 3 dogfish processing plants and the potential loss of 200 jobs. *Id.* at 42075

Moreover, NMFS acknowledges that the proposal may result in the total collapse of the United States based markets for spiny dogfish harvesting and processing. The ability to re-establish the market after the collapse is unknown. *Id.*

### **NMFS's Obligation to Consider Alternatives under the RFA and Magnuson Standard Number 8**

#### ***The RFA Requires an Agency to Consider Alternatives***

Pursuant to section 603 (c) of the RFA, "each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. ..."

In the proposal, NMFS considered 12 different alternatives. The first 7 alternatives consist of different reduction of catch schedules. In essence, they are different magnitudes or variations of the proposal. Alternative 7 consists of a quota and annual trip limits. Alternatives 8 and 9 consist of minimum size limits for spiny dogfish that corresponds to the length that females are mature. Similarly, alternative 10 only allows for the harvest of spiny dogfish that fall within a particular "slot size" limit. Alternatives 11 and 12 distribute the annual quota on a quarterly or bi-monthly basis.

Although NMFS lists 12 alternatives, in reality NMFS is only suggesting two alternatives to the implementation of a quota or reduction in catch —minimum size limits and trip limits. The others are variations on the same theme- reducing the catch that is tantamount to a quota system.

Given the magnitude of impact that this proposal may have on the industry, the Office of Advocacy is concerned by the lack of creativity in developing less restrictive alternatives to address the problem. Is it possible to have a fishery directed at male dogfish? Similarly, were landing limits, aside from size limits, on mature females considered? Did NMFS consider area or seasonal closings? Did NMFS consider possible gear alternatives?

Advocacy questions whether NMFS consideration of alternatives is sufficient to fulfill its obligation under the RFA. On remand, in the case of Southern Offshore Fishing v. Daley, 97-1134-CIV-T-23C, *slip op.* at 5-7, the United States District Court for the Middle District of Florida, Tampa Division characterized the agency's treatment of alternatives as "superficial" and referred the matter of appropriate alternatives to a special master after NMFS failed to consider alternatives aside from "maintenance the status quo" and "closure of the fishery".

The alternatives for the spiny dogfish proposal are not very different from the Southern Offshore Fishing case. Like the Southern Offshore Fishing case, the alternatives are simply different degrees of the proposal. Accordingly, a court could possibly find that NMFS has not met its obligation to consider meaningful alternatives to solve the problem of the spiny dogfish fishery and, therefore, has not met its obligations under the RFA.

### ***Magnunson Standard Number 8***

The Office of Advocacy further asserts that the NMFS may not be meeting its obligations under National Standard 8 of the Magnuson-Stevens Act. National Standard 8 requires NMFS to consider the importance of the fishing resources to the fishing community and select the alternative that minimizes the adverse economic impact on the community. 50 C.F.R. § 600.345(b).

According to the spiny dogfish industry, spiny dogfish landings account for 96% of the total fish landings in Plymouth, MA; 91% of the landings in Wachapreague, VA; and 74% of total landings in Scituate, MA. Moreover, a large percentage of the landings are processed in New Bedford, MA. Communities which such a high dependency on spiny dogfish harvesting and processing may be harmed substantially by the proposal. Did NMFS consider fully the impact that this proposal will have on the communities and select the least restrictive alternative to minimize that impact?

### **Conclusion**

The Office of Advocacy recognizes the importance of protecting the environment and rebuilding the spiny dogfish stock to assure continued availability of the resource. However, Advocacy asserts that the environmental concerns need to be balanced and considered along with the economic impact and viable alternatives that mitigate the impact on spiny dogfish industry.

In this particular instance, the possible impact of the proposal on the industry is quite severe-

the total collapse of the US market for spiny dogfish harvesting and processing. To rebuild a fishery stock in a manner that may cause the entire collapse of the industry is counterintuitive. The Office of Advocacy asserts that all possible viable alternatives should be considered prior to implementing a proposed action that may have such a drastic and devastating impact on an industry. Failure to consider such alternatives would violate the RFA.

If you have any questions, please feel to contact Jennifer A. Smith, Assistant Chief Counsel for Economic Regulation at 202-205-6943. Thank you for allowing me to comment on this important proposal.

Sincerely,

Jere W. Glover  
Chief Counsel  
Office of Advocacy

Sincerely,

Jennifer A. Smith  
Assistant Chief Counsel  
for Economic Regulation &  
International Trade